



THE COMMERCIAL LAW CONNECTION



The National Bar Association
Commercial Law Section

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CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

Message from the Chair

Welcome to Naples! I bring you greetings on behalf of the National Bar Association Commercial Law Section (NBA-CLS). It is both an honor and a privilege to serve as the Chair of this illustrious Section. We are excited to host the 28th Annual Corporate Counsel Conference in Naples, Florida, at the magnificent Ritz-Carlton Golf Resort on February 26-28, 2015. If you missed our 27th Annual Corporate Counsel Conference in Austin, Texas, in 2014, you certainly missed out on a treat. Our 28th Annual Conference will continue our rich tradition of featuring tremendous opportunities for networking and interaction between in-house and outside counsel. Given the positive response, we will continue our corporate interview format with an informal Networking Expo. Every firm will have an equal opportunity to share their expertise with in-house counsel. In addition, we will acknowledge first-time attendees as we integrate them into the NBA-CLS family.



Vickie E. Turner, Chair

We are particularly excited to introduce the “CLS App” for your convenience and real-time information during the Conference. In addition to our twelve CLEs featuring accomplished presenters who are renowned in their respective areas of specialty, we will also introduce an exciting pipeline project. The pipeline project reflects our commitment to reach back

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The Attorney-Client Privilege and Work-Product Doctrine in Internal Investigations: Avoiding a Common Pitfall

By Gilbert Boyce, Esquire*

On March 6, 2014, a United States District Court held that the results of an internal investigation initiated by in-house counsel were discoverable because the investigation was conducted for business reasons rather than for the purpose of obtaining legal advice. *United States ex rel. Barko v. Halliburton Co. et al.* (“Barko I”), No. 05-01276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014). However, on June 27, 2014, the D.C. Circuit Court of Appeals issued a writ of mandamus in *In Re Kellogg Brown & Root, Inc., et al.* (“KBR”), No. 14-5055, 2014 WL 2895939, at *9 (D.C. Cir. June 27, 2014) and held the district court’s ruling was “inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law” and thereby precluded the production of the evidence in dispute. Although the *KBR* decision confirms that the attorney-client privilege in internal investigations is strong in the D.C. Circuit, counsel should always remain diligent and follow best practices in conducting internal investigations to protect the attorney-client privilege and avoid legal challenges to the same.¹

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CLS Reception at NBA 89th Annual Convention

By Kamla Alexander, Esquire*

On a perfect Atlanta summer evening, the National Bar Association’s Commercial Law Section (“NBA-CLS”) held its reception at The National Center for Civil and Human Rights museum in conjunction with the NBA’s 89th Annual Convention. About 150 NBA members and local attorneys attended the reception on July 30th, which was hosted by The Coca-Cola Company with a full bar sponsored by Diageo. Attendees got the opportunity to tour the entire museum and all exhibits, including papers never seen before from Dr. Martin Luther King, Jr.’s writings. After a fabulous keynote address by Bernhard Goepelt, Coca-Cola’s Senior Vice President, General Counsel and Chief Legal Counsel, the NBA-CLS honored two outstanding members with their Outstanding Counsel awards: For in house counsel,

the NBA-CLS honored James Bynoe, Vice President & Director, Commercial Insurance Litigation Management, Liberty Mutual in Boston and for outside counsel, the NBA-CLS honored Tara Elliott, Intellectual Property Litigation Partner at WilmerHale in Washington, D.C.



**Kamla Alexander is Senior Marketing Counsel at The Coca-Cola Company where she supports Sprite®, Fanta® and a number of other sparkling brands as well as various sports league client groups. Kamla also chairs Coca-Cola’s Legal Division Diversity Council.*

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Robert Simpson, Andrew Nunes, Kwamina Williford, Vickie Turner, LaTanya Langley, Kamla Alexander, Greg Wesley, Karol Corbin Walker and Donise Brown



Vickie Turner, Jim Bynoe and Robert Simpson



Kenya Pierre, Tara Elliott and Vickie Turner



Chair's Message... *continued from page 1*

as we climb. We will also continue our very popular dine-around networking opportunity. Each dine-around will be led by an in-house counsel.

Our theme for the Conference, "Raising the Bar," is exemplified by our Honorary Chairs: Vernon Baker, Former Senior Vice President, General Counsel and Secretary of Meritor, Inc.; Douglas M. Hagerman, Senior Vice President, General Counsel and Secretary of Rockwell Automation, Inc.; Desiree A. Ralls-Morrison, Senior Vice President, General Counsel of Boehringer Ingelheim Pharmaceuticals, Inc.; and H. Gwen Marcus, Executive Vice President, General Counsel of Showtime Networks, Inc. We are delighted to have these Honorary Chairs supporting the NBA-CLS. As an added bonus, we will also feature dynamic discussions led by additional general counsel and managing partners focused on their views from the top.



Ritz-Carlton Golf Resort in Naples, Florida

It is my distinct pleasure to announce that our prestigious John Lewis, Jr. Corporation of the Year Award will be presented to MassMutual Financial Group. The award is bestowed upon the legal department that consistently demonstrates commitment to the NBA-CLS and to diversity and inclusiveness. This year, MassMutual partnered with the NBA-CLS for "A Peek Behind the Corporate Veil." This outstanding event offered participants the opportunity to gain an inside view of the inner workings of a Fortune 100 company's legal department. The NBA-CLS is honored to have the support and participation of MassMutual and looks forward to a long term relationship. In addition, our prestigious Cora T. Walker Legacy Award will be presented to Harold Bickham, a partner with Barnes & Thornburg, for his unwavering commitment to the power of diversity, outstanding legal career, and continued support of the NBA-CLS.

The Executive Committee of the NBA-CLS is a dedicated group of people who have worked tirelessly to plan an amazing 28th Annual Corporate Counsel Conference. Enjoy the conference!

Attorney-Client Privilege... *continued from page 1***BACKGROUND**

In *Barko*, Harry Barko alleged that corruption related to certain government subcontracts led to overcharges to the U.S. government. As part of his discovery requests, Barko sought production of investigative reports and related documents from Halliburton's internal review of the allegations. After an *in camera* review of the reports, the court found that the evidence at issue showed evidence of fraud. From 2004 to 2006, Halliburton investigated these allegations under its internal Code of Business Conduct ("COBC").

Under the COBC, upon receiving an allegation, the Director of Business Conduct is required to determine:

(1) whether to open a COBC file; and (2) whether to formally investigate the matter. When an affirmative determination is made, the COBC directs its investigators, non-attorneys, to conduct the investigation. In this case, Halliburton's investigation consisted of the collection of documents, witness statements and personnel interviews. At each personnel interview, the witness was required to sign a confidentiality statement that failed to mention the attorney-client privilege or the involvement of lawyers in the review. After the statement was signed, the document and the corresponding interview notes were placed in the COBC file. A report was then drafted and, along with its supporting material, sent to the legal department.

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A Peek is Worth a Thousand Words

By Gopal M. Burgher, Esquire*

If *A Peek Behind the Corporate Veil*, the recent diversity event hosted by Mass Mutual at its corporate headquarters in Springfield, MA and organized by the Commercial Law Section of the National Bar Association, was designed to demystify the inner workings of the in-house legal black box, then by most measures there were notable successes from the perspective of the law firm attendees. The event, which took place on October 29, 2014 and was “sold out” due to a combination of limited capacity and program design, was unique in its focus and setting—a legal diversity event in a major corporate headquarters setting small enough to facilitate the kind of meaningful interactions that did not require attendees to engage in Darwinian competition. The small and interactive panel format was well suited to achieving the goal of the event. We heard from a well-informed and varied cadre of panelists both from within and without the MassMutual family of companies.



Medina Jett and Steven Wright

Although many topics were covered by various panels throughout the full-day event, two recurring themes seem to cut across all panels, no matter what the formal topic. The first recurring theme was that of knowing your client’s (or prospective client’s) business. The importance of counsel knowing his or her client’s business did not seem capable of overstatement. The point was aptly captured by one panelists who noted that “any time you spend learning your client’s business is never wasted.” It was widely agreed among panelists that clients expect outside counsel to have a working knowledge of their businesses, and that outside counsels who invest the time and resources necessary to learn



Eric Lee, Medina Jett and Steven Wright

their clients business are generally more likely to command their clients’ attention and respect and be sought out for input at the planning stage. As noted by another panelist, the most valued outside counsels are those that can “influence the plan” and not merely execute the plan, and “. . . understanding the business gives outside counsel the confidence to play the role of influencing the plan.” In sum, most panelists agreed that if you understand your client’s business you are less likely to function as a legal gatekeeper and more likely to function as a business facilitator who can translate legal issues into business solutions.

Another recurring theme was that of understanding your accretive value as outside counsel and speaking to it in your communications with in-house counsel. It was noted across panels that, while outside counsel can add



Ed Duch, Robert Simpson, Mark Roellig, Twanda-Turner Hawkins and Jean-Marie Sylla, Jr.

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Attorney-Client Privilege... *continued from page 5***PRACTICE TIPS****Document that the Investigation is Being Conducted for the Purpose of Obtaining Legal Advice, and Not for a Business Purpose.**

Courts have repeatedly raised concerns over the mixing of business and legal communications in potentially privileged material.² At the district court level, the *Barko* court held that “the primary purpose of” the internal investigation “was to comply with federal defense contractor regulations, not to secure legal advice.” *United States ex rel. Barko v. Halliburton Co.* (“*Barko II*”), No. 05-1276, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* (“Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR’s obligation to report improper conduct to the Department of Defense.”). In holding that the district court’s ruling could not be reconciled with the holding in *Upjohn*,³ the D.C. Circuit stated that “[t]he District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis.” *Id.* at *8. It further stated:

the District Court’s approach . . . is not the law . . . The District Court’s *novel approach* to the attorney-client privilege would *eliminate* the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege.

Id. at **8-9 (emphasis added). Lastly, the court held that:

[i]t is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication



plainly has multiple purposes. . . [i]n the context of an organization’s internal investigation, if one of the *significant purposes* of the internal investigation was to obtain or provide legal advice, the privilege will apply.

Id. at *10 (emphasis added).

Internal investigations should never be conducted in a “business as usual” manner. *See United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012) (ruling that an audit report was prepared for a business motivation, and therefore discoverable, because ISS Marine would have investigated the matter in the ordinary course of business even without the prospect of impending litigation).⁴ After *KBR*, courts will likely require corporations to directly show that an investigation was genuinely conducted due to an imminent threat of litigation or, at a very minimum, that one of the *significant purposes* of the internal investigation was to obtain or provide legal advice, and not merely to fulfill routine business purposes.

As such, counsel faced with such a situation should:

- clearly document the purpose and intent of the investigation from the outset;
- make clear that the purpose of the investigation is not a “routine corporate” practice, but instead is in preparation for litigation or to obtain legal advice; and
- diligently document his or her mental impressions on the decision-making process.

Counsel Should Direct and Supervise All Elements of the Internal Investigation.

Both *Barko* and *ISS Marine* illustrate the possible danger of relying on non-lawyers to conduct investigations. While the district court in *Barko* initially distinguished

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Member Spotlights

Tillman J. Breckenridge - Receives NBA's Trailblazers Under 40 Award



Tillman J. Breckenridge received NBA's Trailblazers Under 40 Award at the NBA's Annual Convention in Atlanta, Georgia in July 2014. Tillman is the Chair of the NBA's Amicus Committee and Immediate Past Chair of the Appellate Section. He was born in Southfield, Michigan and moved to Virginia Beach, Virginia as a child.

After graduating from high school, Tillman obtained his Bachelor's Degree in Psychology from the University of Virginia in two years. Tillman then stayed at UVA, earning his J.D. in 2001.

Tillman now is a member of Reed Smith's Appellate Group and leads the appellate practice for the Washington, D.C. and Virginia offices, where he was named a Washington DC Super Lawyer and a member of Virginia's Legal Elite for appellate practice. His practice includes a diverse array of appellate litigation matters at all levels. He has represented companies, organizations, individuals, and foreign, state and local governments before the United States Supreme Court and the U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, District of Columbia, and Federal Circuits as well as the California Courts of Appeal and the Illinois Courts of Appeal. Additionally, Tillman is an Adjunct Professor of Law at the William & Mary School of Law, where he directs the Appellate and Supreme Court Clinic, and has been a lecturer at DePaul University on the subjects of Constitutional Civil Liberties and First Amendment law.

NBA Past President, Paulette Brown to Lead the ABA



Last summer, at the American Bar Association (ABA) Annual Meeting in Boston, MA, former NBA Past President, Paulette Brown, was elected President-Elect of the ABA. Ms. Brown, a Labor & Employment partner at Locke Lord Edwards as well as the firm's chief diversity officer, will take the helm of the 400,000-member

organization next summer. Most notably, Ms. Brown, a long standing member of the Commercial Law Section, has the distinction of becoming the first woman of color to head the ABA in its 137 year history.

NBA Past President John Page - Named Chair of Board of Directors for the Association of Corporate Counsel



In October 2014, NBA Past President, John Page was appointed chair of the Association of Corporate Counsel's (ACC) board of directors. The ACC represents more than 35,000 in-house counsel in more than 85 countries. Mr. Page currently serves as senior vice president, chief corporate social responsibility officer & chief legal

officer at Golden State Foods Corp. in Irvine, CA. Mr. Page assumed his new role at chairman during the ACC's Annual Meeting in New Orleans. He is a long standing member of the Commercial Law Section and was awarded the Section's prestigious Outstanding In-House Counsel of the Year Award in 2013.

Gregory M. Wesley - Receives Recognition



Gregory M. Wesley, Equity Partner at Gonzalez Saggio & Harlan LLP, was recently recognized by the St. Francis Children's Center with a Community Service Award for his work as a Milwaukee area leader. Mr. Wesley was also recently elected to the Metropolitan Milwaukee Association of Commerce Board of Directors. Finally, he was recently elected as a Class of 2014 Fellow by the Wisconsin Law Foundation's Board of Trustees. The Wisconsin Law Foundation recognizes lawyers who are known by their peers for high professional achievement and outstanding contributions to the advancement and improvement in the administration of justice in the State of Wisconsin.

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Member Spotlights

Kwamina Williford - Receives Trailblazers Under 40 Award



On July 26, 2014, The National Bar Association (“NBA”) honored Kwamina Thomas Williford as a recipient of its Trailblazers Under 40 Award during its annual convention in Atlanta. Ms. Williford was recognized as one of 40 rising star attorneys under the age of 40 being honored for having “achieved prominence and distinction

in their fields of endeavor . . . and who have demonstrated a strong commitment to advancing the goals and mission of the National Bar Association.” As one of the youngest African-Americans elevated to Holland & Knight’s partnership ranks, Ms. Williford practices primarily in the area of compliance services and enforcement defense. She successfully leads investigations responding to various government agencies about alleged improper activity. She draws upon her experience to advise clients on the design and implementation of comprehensive compliance programs. As a leader within the NBA, she has served on the executive committee of the Commercial Law Section (2011-2014) as well as on the Judicial Selection Committee (2012-2013). She is a mentor to

many and is passionate about widening the pipeline of diverse attorneys into the profession as seen in her support of Just the Beginning Foundation – A Pipeline Organization. Ms. Williford has been recognized as a rising star by the Washington, D.C. and Massachusetts SuperLawyers Magazine.

Vickie E. Turner - Selected Woman of the Year



Vickie E. Turner, Chair of the NBA-CLS, has been selected Woman of the Year for the California 79th Assembly District which includes the cities of Chula Vista, LaMesa, Lemon Grove, National City and San Diego. She received this recognition based on her accomplishments in the legal field, including being a named partner of one

of the largest women-owned law firms in Southern California, and her community service including co-founder of a science, technology, engineering and math program (STEM) for fourth through eighth grade students of color. She will receive this honor on the floor of the California State Assembly in March.

Upcoming Events



July 19-23, 2015

NBA 90th Annual Convention
Westin Bonaventure Hotel & Suites,
Los Angeles, California

February 18-20, 2016

**29th Annual
Corporate Counsel Conference**
Scottsdale Resort & Spa at Gainey Ranch
Scottsdale, Arizona

February 23-25, 2017

**30th Annual
Corporate Counsel Conference**
Intercontinental Buckhead Atlanta,
Atlanta, Georgia

National Bar Association Commercial Law Section 2015 Corporate Counsel Conference Sponsors

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Bridges Law Group
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 Taylor, Sylla & Agin, LLP

A Peek is Worth a... *continued from page 4*

value in varied ways, one of the biggest advantages that outside counsel enjoys, and that in-house counsel and their business clients seek, is the concept of the industry perspective. Outside counsel generally sees more deals, cases, transaction structures and litigation strategies than in-house counsel and, as a result, can speak to industry perspectives, best practices, trends, and market and off-market practices, all of which are valued by clients. In some ways, as one panelist noted, this is not so much a competitive edge as it is an expectation among clients. It becomes a competitive advantage only to the extent that so many outside counsels are unaware of or otherwise not focused on this important client expectation of value—a value which can go a long way in enabling counsel to influence the plan.

Other topics covered throughout the event also spoke to ways for minority outside counsel to break out of the pack and get noticed. In addition to the above, the suggestions advanced by panelists were varied and included (among others) practical advice such as: speaking to legal costs and performance efficiencies in a meaningful way, choosing a call or a physical meeting over sending an email, and clearly identifying what you are really good at and do better than anyone else. Panelists were keen to note that while diversity and inclusion were important from a strategic perspective, they were not the most important criteria in the hiring of outside counsel, and there is no substitute for knowing your craft and operating at the top of your game.

The formal aspect of the day's event was capped off by a presentation by Mark D. Roellig, Executive Vice President and General Counsel of MassMutual, who



provided information on his organization's approach to various challenges as well as his views on certain salient trends shaping the industry. Mr. Roellig began his presentation by questioning the value of convergence as a strategy, noting that it has not worked as anticipated, especially in the area of cost savings. As support, he highlighted the trend toward hiring lawyers instead of law firms, which trend he thought favored minority

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A Peek is Worth a... *continued from page 9*

firms. He also emphasized the business goal of keeping legal costs flat and touted fixed fee arrangements as an effective cost management tool in that fight that aligns the interests of both the client and the law firm involved. He also noted the trend of more and more work being brought in-house to save costs and the higher utilization of non-lawyer professionals (e.g., paralegals) to do work that has traditionally been done by junior lawyers, as paying for work done by such lawyers has become an economically unjustifiable in terms of value received. Mr. Roellig's most thought provoking ideas, however, were reserved for his views on diversity and inclusion, which began with the proposition that demographic changes dictate an emphasis on diversity and inclusion in order for business to be strategic. He not only articulated a compelling business case for diversity and inclusion but made clear that the right way to do it was not only to reward (i.e., develop and promote) those who actively advance diversity/inclusion goals but to deter (i.e., demote/ terminate) those who do not. This last part (i.e., demotion/termination) quickly caught the attention of several in the audience, one of whom interrupted Mr. Roellig to commend him on his willingness to use the stick, realizing that carrots alone won't do the trick.

Those who attended the event would probably agree that the principal value did not lie in the uniqueness of any substantive message or statement that was espoused, in so far as most of us probably have heard some version of those views previously. The biggest value or thing of note was the substantive focus of the event, the setting and format and the candor with which the participants were willing to speak and be engaged on the issues. In this regard, MassMutual should be congratulated or otherwise recognized for its demonstrated leadership in the area of diversity and inclusion in the legal profession, as well as NBA Commercial Law Section committee members should be commended for a very substantive needle-moving production.



**Gopal M. Burgher is a Partner at Burgher Gray Jaffe LLP (New York). Mr. Burgher's principal practice area is capital markets/finance, with a concentration in structured finance and securitization. Mr. Burgher can be reached at gburgher@burghergray.com. is a Partner at Burgher Gray*

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February 18-20, 2016

**Hyatt Regency Scottsdale
Resort & Spa at Gainey Ranch
Scottsdale, Arizona**

Commercial Law Section Hosts Insights from Enforcement Agencies Panel and Webinar

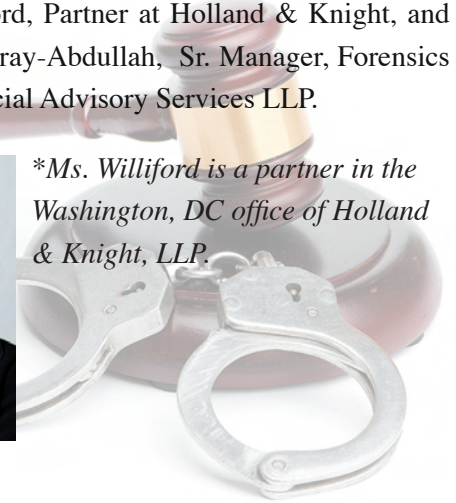
*By Kwamina Thomas Williford, Esquire**

The National Bar Association’s Commercial Law Section (“NBA-CLS”) together with Holland & Knight, LLP and Deloitte Financial Advisory Services LLP co-sponsored a panel discussion and webinar on *Insights from Federal Enforcement Agencies* on November 20, 2014 in Washington, D.C. Specifically, the event centered around the notion that today thriving companies must navigate an abundance of regulatory obligations and legal requirements to avoid allegations of improper conduct, fraud or abuse. The panel emphasized that knowing what enforcement officials are focused on and what minefields they are seeing for companies is always helpful for companies to navigate this terrain. During this program, Erica Y. Williams, Deputy Chief of Staff, U.S. Securities and Exchange Commission and Beverly M. Russell, Assistant U.S. Attorney, U.S. Attorney’s Office for the District of Columbia, Civil Division provided participants with their insights for enforcement trends for

2015. Some of the topics included false certifications; minefields that government contractors should avoid related to pricing; analytics used to help detect potential volatile activity; and actions that companies have taken to mitigate penalties and enforcement considerations. The discussion was moderated by NBA-CLS members, Kwamina Williford, Partner at Holland & Knight, and Rashida MacMurray-Abdullah, Sr. Manager, Forensics at Deloitte Financial Advisory Services LLP.



**Ms. Williford is a partner in the Washington, DC office of Holland & Knight, LLP.*



CLS Reception at NBA 89th Annual Convention... *continued from page 2*



Attorney-Client Privilege... *continued from page 5*

its case from *Upjohn* on a variety of grounds, including relying on non-lawyers to conduct investigations, the D.C. Circuit held that none of those purported distinctions took the case out from under *Upjohn*'s umbrella. The D.C. Circuit stated that not only was the investigation conducted at the direction of the attorneys in KBR's law department, but also that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."⁵

Conversely, in *ISS Marine*, a district court focused on the lack of direct participation by attorneys in many facets of the investigation and held that:

[i]t is only when counsel's strategic and legal expertise is applied and counsel's involvement becomes more direct and meaningful, i.e., when counsel prioritizes the investigative steps, selects specific witnesses, conducts particular interviews, or reviews particular documents, that a company's genuine anticipation of litigation manifests itself.

905 F. Supp. 2d at 138 n.9.

Accordingly, the absence of input, direction and supervision by attorneys throughout all stages of the investigation will likely expose the company's records to discovery from third parties seeking the fruits of the investigation.

Consequently, counsel should:

- make clear that any non-lawyer who is participating in the investigation is doing so at the direction of counsel;
- make clear to all members of the investigative team as well as interviewees that the investigation is being conducted at the direction of counsel for legal purposes; and;
- require that all individuals who are involved with the investigation report to counsel.

SUMMARY

Internal investigations are essential when allegations of misconduct arise. Regardless of the type of alleged misconduct, from the very beginning, counsel should always take proactive steps to preserve the attorney-client privilege and the work-product doctrine. Special

care and attention should be given to any investigation whose purpose may be argued to be for business or compliance reasons.



**Mr. Boyce is a Partner in the Washington, D.C. office of Kutak Rock LLP. This article was written by Mr. Boyce with assistance from Gregory Mottla, Esq. Mr. Boyce has been lead trial or appellate counsel for multinational corporations, brokerage firms, financial institutions, insurance companies, non-profit organizations and accounting firms in a wide range of complex litigation in federal and state courts, the U.S. Tax Court and before various arbitration tribunals. He also has extensive experience conducting internal investigations. His practice also includes representing clients in government investigations, including handling disputes with the DOJ, SEC, FINRA and IRS.*

Prior to joining Kutak Rock, Mr. Boyce was employed for over 10 years with the IRS, where he participated in cases involving money laundering, income tax evasion, Ponzi schemes, financial fraud, racketeering and grand jury investigations. Mr. Boyce is a Certified Public Accountant.

¹ See, e.g., *Exxon Mobil Corp. v. Hill*, 751 F.3d 379 (5th Cir. 2014). The Fifth Circuit held that the attorney-client privilege applied to an in-house counsel's memorandum providing advice on a transactional matter. The Fifth Circuit "recognize[d] that in-house counsel can often play a variety of roles within an organization," *id.* at 382, and upheld the corporation's attorney-client privilege because the record before it was "devoid of any indication that [in-house counsel] was providing business advice divorced from its legal implications." *Id.*

² See, e.g., *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 799 (E.D. La. 2007) (Defendant was required to establish, on a document-by-document basis, that the "primary purpose" of each communication was "for the purpose of rendering legal advice or assistance . . . ; merely because a legal issue can be identified that relates to ongoing communications does not justify shielding them from discovery.").

³ *Upjohn Company, et al. v. United States*, 449 U.S. 383 (1981).

⁴ This case involved a government petition to enforce an administrative subpoena seeking an internal audit report of ISS Marine issued by the DOD's IGO (Department of Defense Inspector General's Office). The audit report in dispute was prepared by an internal auditor at ISS Marine based on an audit conducted at the direction of corporate executives with the goal of investigating fraud at ISS Marine's facilities in the Middle East. Prior to issuing the audit report, an executive at ISS Marine spoke with outside counsel who conducted preliminary interviews of two corporate employees. In these interviews, outside counsel proposed that his firm be retained to conduct an internal investigation and outlined the framework under which such investigation would be conducted. Ultimately, outside counsel did not conduct the investigation. The final report was marked as "confidential," but not privileged.

⁵ See *FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); see also 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted.").

**NATIONAL BAR ASSOCIATION
COMMERCIAL LAW SECTION**

2014-2015

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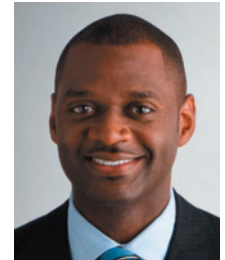
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